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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ERNEST DAMAN, NATHAN H. HURT AND A. ALAN MOGHISSI IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted in support of the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (1997) (reproduced at Pet. App. la-33a)[1,2].

Amici are individuals who are members of the American Society of Mechanical Engineers. They have substantial experience in engineering and environmental regulatory compliance. They have frequently been required to interpret regulatory terms and standards in the environmental and engineering fields. They are dedicated to the idea that societal decisions must be based on the best available scientific information.

This case involves interpretation of a U.S. Environmental Protection Agency ("EPA" or "Agency") regulation entitled National Emission Standards for Equipment Leaks (Fugitive Emission Sources) of Benzene, 40 C.F.R. Part 61, Subpart J ("NESHAP" or the "benzene NESHAP").

The government's multiple counting method that is the basis for the government's position in the case is at odds with the common understanding and use by scientists and engineers of the pertinent terms. EPA's current position distorts the meaning of the regulation at issue, disregards the relevant rule-making background contained in the administrative record, and marks a change from the Agency's previous interpretation of the benzene NESHAP, Subpart 3 exemption at issue. When the interpretation of regulatory standards changes over time, and changes without opportunity for comment by social, professional or commercial groups affected, stability and predictability are

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

defeated, and it is no longer possible to rely on the previously accepted meaning of terms in a regulation and to determine the action or forbearance needed to comply with the regulations. These concerns affect not only this case, but – given the broad reach of government regulations – will affect not only *amici* and their professional colleagues who are frequently called upon to interpret regulatory standards, but corporations and individuals as well who are the subject of regulation.

Amici submit that the decision of the court of appeals was incorrect insofar as that court deferred to EPA and upheld the Agency's interpretation of the word "use" in 40 C.F.R. § 61. 1 10(c)(2). *Amici* also submit that the court of appeals incorrectly gave deference to the government's latter day definition of "use" notwithstanding the uncontroverted evidence that such a definition was inconsistent with use of that term in the relevant professional community.

Amici respectfully urge the Court to grant the petition for a write of certiorari.

INTEREST OF *AMICI*

As noted above, *amici* are scientists and engineers, active in their professional organizations. Two of them are past presidents of the American Society of Mechanical Engineers (ASME)[3], and the third is currently chair of the Environmental Engineering Division of ASME. One of them was, in addition, a senior scientist with EPA. They have in their careers often been called upon to interpret regulations, particularly EPA regulations. They are familiar with the terminology of the regulation at issue as it applies to industrial processes and pollution control.

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[3] *Amici* appear in this case only in their individual capacities, and do not purport to articulate the views of any organization to which they belong, except as explicitly set forth in the text.

Ernest L. Daman is Chairman Emeritus of Foster Wheeler Development Corporation and he previously served as Chairman of the Board of Foster Wheeler Development Corporation and before that as Director of Research of that company. He also held the position of Senior Vice President at its parent company, FWC. He is a Past President of American Society of Mechanical Engineers. Mr. Daman was elected to the National Academy of Engineering. He is a member of the American Association for the Advancement of Science and Past Chairman of the American Association of Engineering Societies. He is a Fellow of the Institute of Energy (England). He served on several ASME committees as member or chairman. Ernest Daman is the author of numerous papers, and holds 18 patents. He was responsible for the design and development of a combined steam gas turbine plant, fluidized bed combustion, fast breeder reactor components, supercritical steam generators, environmental control processes, and advanced high-efficiency power generation systems. He received his B.M.E. from the Polytechnic Institute of Brooklyn.

Nathan R. Hurt is vice president of IDM Environmental Corp. Previously, he worked for Los Alamos Technical Associates and the Goodyear Tire and Rubber Company. He was president of the Goodyear Atomic Corporation, a subsidiary of Goodyear Tire. He is a mechanical engineer with 50 years of experience in the chemical and nuclear industries. Nathan Hurt is a recent Past President of the American Society of Mechanical Engineers. His chemical industry experience includes design, construction and plant management – primarily in vinyl monomers and copolymers, synthetic rubbers and resins, and polyesters. His nuclear industry experience consists of project management, facilities management, and marketing in uranium enrichment and weapons plants. He is currently a member of the Nuclear Engineering Advisory Board of Worcester Polytechnic Institute. He received his B.S. in Mechanical Engineering from the University of Colorado and he is a registered professional engineer in Ohio.

A. Alan Moghissi is President of the Institute for Regulatory Science (RSI), a non-profit organization dedicated to the idea that societal decisions must be based on the best available scientific information. The activities of the Institute include research, scientific assessment, and science education at all levels-particularly the education of minorities. Dr. Moghissi held positions at the U.S. Public Health Service and, upon its formation, the U.S. Environmental Protection Agency (EPA). He served in a number of capacities at EPA, including Director of the Bioenvironmental/Radiological Research Division; Principal Science Advisor for Radiation and Hazardous Materials; and Manager of the Health and Environmental Risk Analysis Program. After his retirement from the EPA, Dr. Moghissi joined the University of Maryland at Baltimore as Assistant Vice President for Environmental Health and Safety; subsequently he was Associate Vice President for Environmental Health and Safety at Temple University in Philadelphia, Pennsylvania. He has been a visiting professor at Georgia Tech and at the University of Virginia. Dr. Moghissi's research has dealt with diverse subjects, ranging from measurement of pollutants to the biological effects of environmental agents. A major segment of his research has been on scientific information upon which laws, regulations, and judicial decisions are based -- notably risk assessment. He has published over 300 papers and several books. He is the editor-in-chief of *Environment International* and of *Technology: Journal of The Franklin Institute,* which is one of America's oldest continuously published journals of science and technology. Dr. Moghissi is a member of the editorial board of several other scientific journals. He is chairman of the Environmental Division of the American Society of Mechanical Engineers. Dr. Moghissi received his education at the University of Zurich, in Switzerland, and Technical University of Karlsruhe in Germany, from which he received a doctorate in physical chemistry.

REASONS FOR GRANTING THE WRIT

I. EPA's Multiple Counting Interpretation is Inconsistent with the History of the Rulemaking and with the Meaning of the Critical Terms as Understood by Members of the Relevant Professions

The legal issue underlying this case is whether the company's Celriver, South Carolina chemical manufacturing plant qualified for an exemption from an EPA regulation available for "[a]ny equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61,1 10(c)(2). The exemption was intended to reach plants that collectively represented only one-half of the one percent of benzene emissions and thus were not cost-effective to regulate. Pet. App. 4a.

The court of appeals deferred to an interpretation that EPA has itself described (in a closely related benzene regulation) as the "multiple counting" approach. *See* 40 C.F.R. § 61,342(a) (1997) (Pet. App. 173a). In deferring to that interpretation the court of appeals rejected the interpretation frequently expressed over the years by EPA itself[4], state environmental regulatory agencies and in the unrebutted testimony of scientific and engineering experts that "use" in the context here relevant means "consumption" (referred to by the district court as "the single counting approach").

Use of terms that have a common (mutual) understanding by both regulators and the regulated community (and its advisors) is critical to accomplishing the purpose of a regulation. This is not to say that regulations cannot change over time, but when they are

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[4] *See* Affidavit of Robert L. Ajax, Def. Exh, 18, ¶ 5, Pet. App. ___. As Mr. Ajax explained, a "determination based on nameplate capacity cannot be reconciled with multiple counting based on recycle." *Id.* Mr. Ajax concluded that any claim by DOJ that EPA attempted to promulgate a multiple-counting approach would be "plain wrong." Id.

changed, the usual administrative procedures, affording notice of the proposed changes and opportunity for comment, should be followed to protect the rights of the regulated. The circuit court's decision in this case, deferring to EPA's "multiple counting" approach to defining "use," disregards the common understanding of that word as scientists and engineers employ it.

By adopting a definition which derives the amount of benzene "used" by the Celriver Plant over the course of a year by counting the same benzene molecules over and over again, the government argued, and the Fourth Circuit agreed, that the Celriver Plant "uses" 2.59 million megagrams of benzene per year, and thus is not entitled to an exemption. *See* Pet. App. 5a. The exemption applies to a "plant site" designed to "produce or use" less than 1,000 megagrams of benzene annually.

Some government regulators considering this question reached contrary conclusions, noting that Hoechst "has successfully reduced the consumption of benzene to less than 1000 Mg per year and thus is exempt from the standards" of the benzene NESHAP.[5] EPA's regional offices disagreed on how to interpret the benzene NESHAP exemption. *See* Pet. App. 28a, *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (1997) The EPA bureaucracy "could not itself agree on the proper reading of its own regulation.")(dissenting opinion).

If the regulatory process is to function properly, in particular in matters of engineering and scientific technology such as involved in this case, the regulated community must be able to rely on the accepted, commonly understood meaning of the terms that underpin the regulatory standards. Significantly different interpretation by a regulatory agency of terms that have a commonly understood meaning in the relevant professional or business

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[5] *See* Def. Exh. 64, Compliance Monitoring Report, Dr. George Marusak, EPA Region IV, December 9, 1986). The same EPA engineer later testified that he had never heard of the multiple-count approach to benzene "until told by counsel" in connection with this litigation. *See* Marusak Dep., Def. Exh. 32, at 170-72.]

communities should be considered arbitrary unless the agency can justify its interpretation by showing that its own definition is based on recognized scientific principles and furthers the legislative purpose of the relevant statute[6].

II. Judicial Deference to The Agency's Interpretation of Its Rule Is Not Required or Appropriate Where That Interpretation Is Contrary to Common Usage, Has Been Ambiguous or Inconsistent and Was Adopted Without Notice and Comment.

Amici also urge the Court to examine the proper boundaries for judicial deference to agency regulatory interpretations. The deference that the Fourth Circuit afforded EPA's interpretation of "use" is inappropriate in circumstances such as those present in this case.

A. EPA's Interpretation of "Use" is Contrary to Standard Usage, is Arbitrary and Should Not Be Accorded Deference.

EPA, in choosing to define "use" by using a multiple counting method, disregards the well-understood principle used by scientists and engineers that recirculating flows are not the same as "throughput." The example used by Dr. E. Bruce Naumann, one of Hoechst's experts (whose testimony was unrebutted) of recirculating coolant in an automobile engine is clear:

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[6] While EPA may be entitled to depart substantially from a commonly accepted meaning, as EPA has done here, in order to achieve a policy goal articulated in legislation, the rulemaking process must give the regulated community notice of the agency's departure and an opportunity to convince the agency why its unusual interpretation is incorrect or not in furtherance of legislative purposes. EPA did not do so with respect to its interpretation unilaterally imposed long after the regulations were published and after this litigation began.

> The coolant or antifreeze is recycled through the system when the automobile operates. At the end of the year, the automobile may require the addition of some antifreeze to maintain a full cooling system. The cooling system would be considered to have "used" antifreeze during the year equivalent to the amount...added to the system. Under generally accepted chemical engineering principles, the molecules of antifreeze would not be recounted multiple times as they are recycled in the cooling system to calculate a "use" number. Otherwise, the cooling system would be considered to have "used" tens of thousands of gallons of antifreeze over the course of the year[7].

Dr. James Wei, Dean of the School of Engineering at Princeton University, and another unrebutted expert witness for Hoechst, stated even more critically of EPA's approach:

> The term "throughput" is ordinarily taken to mean overall net production or consumption, not internal circulation rate. The interpretation that "throughput is intended to mean total cumulative flow through equipment in benzene service rather than net consumption or usage, found in EPA's June 13, 1989 letter to the Celriver plant[8] demonstrates a surprising ignorance of commonly accepted concepts and practices in chemical engineering.[9]

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[7] Def. Exh. 36, Initial Report of Dr. E. Bruce Naumann, at 3.

[8] Pet. App. 20a.

[9] Def. Ex. 40, Initial Report of James Wei, at 2. Emphasis supplied.

In other words, engineers and other scientists understand "used" in the context of a recirculating catalyst acting as a "reflux agent" (as at the Celriver plant) to mean the amount needed to "top off" the system. That amount is much more relevant to the purpose of the statute and the regulations, for that is the potential amount actually escaping into the environment. This amount can be measured directly and accurately, without the need for a "proxy" such as total quantity in circulation measured at numerous points.

Dean Wei's comment that the EPA interpretation "demonstrates" a surprising ignorance of accepted concepts and practices in chemical engineering" is significant because it compels the conclusion that EPA's interpretation is not based on "expertise" and is arbitrary.

But, even regulations adopted pursuant to an explicit statutory delegation are not given controlling weight if they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (*"Chevron"*). The Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, commands reviewing courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

While a court must give substantial deference to an agency's interpretation of its own regulations, *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1 (1965), it need not do so if the interpretation is "arbitrary."

This Court has also held that deference is even more warranted when the regulation concerns "a complex and highly technical regulatory program," which requires significant expertise and entail the exercise of judgment grounded in policy concerns, *Pauley v. BethEnergy Mines*, Inc., 501 U.S. 680, 697 (1991). We respectfully submit, however, that when the interpretation discloses ignorance of

accepted usage in the regulated field, as is the case here, the agency's "expertise" is called into question and the reviewing court should undertake an examination of the issue, rather than merely defer to the administrative agency.

However, to avoid converting "deference" to abdication of the judiciary's ultimate power of judicial review, the courts should accept only those agency interpretations "that are reasonable in light of the principles of construction courts normally employ," (*see* Scalia, J., concurring in part and concurring in the judgment, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991)) including common usage. When the agency fails to consider an important aspect of the problem, or has offered an explanation that is contradicted by the evidence before the agency, or "is so implausible that it could not be ascribed to. . .the product of agency expertise," *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company*, 463 U.S. 29, 43 (1983), the courts owe no deference to the agency's interpretation. We submit that there was no record evidence to support EPA's interpretation of "use" advanced in this litigation because there was no opportunity for public comment. We do know that two experts, with whom *amici* concur, found that EPA's position was based on ignorance, wilful or otherwise, of practice and scholarship in the relevant fields.

As Justice Thomas noted in his dissent in *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994), by affirming EPA's adoption of a definition at odds with the commonly understood usage, the courts disserve "the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve. . . ambiguity in a statutory text. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). *See also Chevron*, 467 U.S. 837, 865-866 (1984)."

EPA's interpretation of "use" also runs counter to the purpose of many federal environmental laws and programs which are designed to induce industry and the public to recycle. The EPA's approach to measuring benzene use destroys any incentive to recycle that substance because it provides no reward for recycling hazardous materials to minimize environmental exposure to such chemicals.

B. EPA's Interpretation of "Use" Has Not Been Advanced Consistently and Should Not Be Accorded Deference.

EPA has never set out a reasoned basis for its interpretation of the 1984 benzene NESHAP. It did not develop that interpretation through notice and comment rulemaking. Instead, E.P.A.'s interpretation of the Subpart J exemption has changed many times and differed from one EPA region to another.[10] EPA's current interpretation of "use" is far from obvious; indeed it is contrary to the common usage of the term, and it was developed without the procedural protections of notice and comment rulemaking. In such circumstances, judicial deference is not only inappropriate, it is an abdication of the critical role of the federal courts in judicial review of agency action.

An agency's interpretation of its own regulation is not entitled to deference from a reviewing court unless the same interpretation has been advanced consistently. *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987). Here, not only did EPA Regions 4 and 6 differ in their respective interpretations of the exemption from the benzene NESHAP, but EPA changed its mind about what "use" meant after completion of the rulemaking process and during the course of implementing the rule. As the dissent in the court of appeals noted, the agency "had at least three different approaches for measuring use: (1) consumption of benzene in a year, (2) the throughput of benzene through a plant for a year, and (3) the total quantity in use at the plant." Pet. App. 32a. Although an agency's interpretation of its own regulations is generally entitled to judicial deference, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S.

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[10] In the preamble to the 1984 rule, EPA's Administrator equated "use" with benzene "consumed" or "on hand." Hoechst relied on this interpretation, a "natural reading" of the regulation, Pet. App. 29a, in concluding that its Celriver plant was exempt. In addition, when Hoechst sought interpretation from regulators regarding two of Hoechst's plants in Texas, state regulators and EPA Region 6 confirmed that "use" refers to consumption or inventory. It was only later that EPA Region 4 decided that "use" is determined by recounting the same benzene each time it circulates through a plant.

680,698 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 866 (1984) (*"Chevron"*), "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views, " *Pauley*, 501 U.S. at 698. *See also Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n. 30 ("an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view') (citation omitted).

From a scientific or engineering perspective, there is no basis for according deference to the EPA's interpretation of "use" in the circumstances of this case. When an agency adopts multiple positions on central issues in a rulemaking -- such as the meaning of the term "use" -- the persons regulated and their scientific and engineering advisors cannot rely on the plain meaning of regulatory terms and cannot conform their actions or their advice to the requirements of the law. Deference to the agency is not due in a case like this where the agency has not articulated an authoritative and considered interpretation of its rule but has instead been inconsistent and ambiguous and avoided important procedural protections. *Amici* submit that the Court should grant the petition for a writ of certiorari in order to address the serious precedential impact of the decision below[11].

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[11] We do not suggest that regulatory agencies must never change their rules or their interpretations, and we concede that an agency "must have ample latitude to 'adopt their rules and policies to the demands of changing circumstances.'" *See Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 29, 41 (1983), quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Dated: May, 1998

Respectfully submitted,

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